

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH R. HOLBERG,

Plaintiff,

vs.

COUNTY OF OKANOGAN,
JUDGE JACK BURCHARD,
ATTORNEY ANTHONY
CASTELDA and JOY A
HOLBERG-RUSTAN,

Defendants.

NO. CV-10-5095-CI

ORDER REJECTING REPORT AND
RECOMMENDATION AND GRANTING
MOTION TO VOLUNTARILY DISMISS

BEFORE THE COURT is a Report and Recommendation to Dismiss the Complaint without Prejudice for failure to state a claim upon which relief may be granted (ECF No. 21). Plaintiff, a prisoner at the Coyote Ridge Correction Center, is proceeding *pro se* and *in forma pauperis*. Defendants have not been served.

Plaintiff brought this action against his former spouse, her attorney, and the judicial officer presiding over a state court marriage dissolution proceeding. Although granted numerous opportunities to do so, Plaintiff failed to amend his complaint to allege any facts to lower the shield of judicial immunity. *Stump v. Sparkman*, 435 U.S. 349, 357 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).

He also failed to show his former spouse or her attorney were "persons acting under color of state law" for purposes of 42 U.S.C. § 1983. *Price v. State of Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

1 Finally, Plaintiff failed to allege facts showing the County of Okanogan engaged in a
2 pattern or practice that resulted in the deprivation of his constitutional rights. *Gobel v.*
3 *Maricopa County*, 867 F.2d 1201, 1206 (9th Cir. 1989), (citing *Monell v. New York City*
4 *Dep't of Social Services*, 436 U.S. 658, 690-94 (1978)). Therefore, Magistrate Judge
5 Imbrogno recommended dismissal of the complaint without prejudice for failure to state
6 a claim upon which relief may be granted (ECF No. 21).

7 Rather than file Objections as instructed in the Report and Recommendation, Mr.
8 Holberg has filed a Motion to Voluntarily Dismiss the Complaint pursuant to Rule 41(a),
9 Federal Rules of Civil Procedure (ECF No. 22). Because Mr. Holberg is proceeding *pro*
10 *se*, and the consequences of having a case dismissed for failure to state a claim upon
11 which relief may be granted could adversely affect Mr. Holberg's future ability to
12 proceed *in forma pauperis*, the court will liberally allow Plaintiff to voluntarily dismiss.

13 Accordingly, **IT IS ORDERED** the Report and Recommendation (ECF No. 21) is
14 **REJECTED** and Mr. Holberg's Motion (ECF No. 22) is **GRANTED**. The Complaint is
15 **DISMISSED WITHOUT PREJUDICE**. Although granted the opportunity to do so,
16 Plaintiff did not file a separate Motion and Affidavit to waive the remaining balance of
17 the filing fee as directed. Therefore, Plaintiff still is obliged to pay the full filing fee for
18 this action pursuant to 28 U.S.C. § 1915(b).

19 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
20 Order, enter judgment of dismissal without prejudice, forward a copy to Plaintiff, and
21 close the file. The court certifies any appeal of this dismissal would not be taken in good
22 faith.

23 **DATED** this 11th day of May 2011.

24
25
26 s/ Rosanna Malouf Peterson

27 ROSANNA MALOUF PETERSON
28 CHIEF UNITED STATES DISTRICT JUDGE